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IN THE

Supreme Court of the United States

October Term, 1952.

No. 268

ALFRED VICTOR duPONT,
Petitioner,

v.

DOROTHY ELIZABETH BARTON duPONT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

Alfred Victor duPont prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Delaware entered on July 3, 1952.

I. Opinions Below.

The opinion of the Supreme Court of the State of Delaware appears in the record at p. 433, and is reported in — A. 2d —. The opinion of the Superior Court of the State of Delaware (trial court) appears in the record at p. PA 488,[1] and is reported in 85 A. 2d 706.

II. Jurisdiction.

The judgment and mandate of the Supreme Court of the State of Delaware was entered on July 3, 1952 (R. 452-453).[2] A petition for re-argument, seasonably filed, had been denied on June 30, 1952 (R. 452). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(3).

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1. PA—refers to Appellant's Appendix.
2. R.—refers to the record of proceedings in the Supreme Court of the State of Delaware.

III. Questions Presented.

1. Does the Full Faith and Credit Clause *compel* recognition by a sister state of a divorce decree obtained by collusion of the parties in creating a fictitious cause of action?

2. Did not the court below deny petitioner due process of law when it erroneously held that the collusively obtained Texas divorce decree was not a nullity under Texas law?

IV. Constitutional Provisions Involved.

This petition involves the meaning and effect of Article IV, Section 1, United States Constitution (the Full Faith and Credit Clause) and Section 1 of the Fourteenth Amendment (the Due Process Clause).

V. Statement.

No issue of fact is raised by this petition. All of petitioner's factual contentions were assumed by the court below to have been fully established (R. 435).[3]

Petitioner went through a marriage ceremony with respondent, Dorothy Elizabeth Barton duPont, on November 20, 1948 in New York (PA 3, 12). No child was born of this union (PA 6, 13). Respondent had previously married Willard R. Wigley on July 7, 1934 (PA 3, 12). She obtained a collusive decree of divorce from Wigley in Texas on July 6, 1940 (PA 321-327). Wigley is alive and has not remarried (PA 5, 13).

From 1936, until just before the Texas divorce respondent lived apart from Wigley, pursuing a theatrical career, first in California and then in New York (DA 4-13;[4] PA

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3. The lengthy record is largely made up of testimony relating to fraud practiced by respondent on petitioner to induce him to marry her in New York, which issue is not presented by this petition.

4. DA—refers to Appellee's Appendix.

311, 313-315). In May or early June of 1940 she went to visit and live with Wigley in Texas (PA 297-299, 411-412). Shortly after her arrival in Texas respondent told Wigley that marriage had hampered her career and that it would be to her advantage if she were not married (PA 319-320, 297). Since Wigley had been sending her some expense money, but had seldom seen her, he felt it also would be to his advantage if he were not married to her (PA 319). They, thereupon, agreed that they should get a divorce "amicably" (PA 297-301, 412). Wigley took her to his lawyer and they told the lawyer they wanted to get divorced (PA 321, 325). Grounds were "made up" to fit the Texas statutes (PA 325-326). The grounds invented were cruelty, although there had been no cruelty (PA 8-9; 319, 325-326, 411-413).

The Texas lawyer learned they were living together as husband and wife in Wigley's apartment. He told respondent it would be necessary for her to move out before the petition for divorce was filed and that she could not live with Wigley during the thirty-day period required in Texas between the filing of the divorce petition and the hearing (PA 326-327, 297-298). A petition charging cruelty was prepared and shown to Wigley, who testified he had not cared what the charges were or what was alleged against him so long as their agreement to obtain a divorce could be effectuated (PA 325-326, 329). He signed a waiver (PA 10, 328). The petition was filed on June 4, 1940, which was less than a month from the time respondent had arrived from New York (PA 323). A hearing was had on July 6, 1940. She was the only witness (PA 83). Wigley was in Chicago at the time (PA 327). A divorce decree was entered after the Texas court found that the allegations of the petition, which were false, had been established as true (PA 11). Respondent returned to New York immediately after she obtained the decree of divorce (PA 328, 417).

The allegations of the petition were false not only as to the existence of a ground for divorce, but also as to requisite residence. Since, however, residence does not appear to be jurisdictional in Texas, petitioner does not rely on this defect as a reason for granting the Writ.

The court below assumed that petitioner's factual allegations were established by competent evidence. Specifically the court below assumed:

> "1. That the defendant [respondent] had abandoned her residence in Texas before filing her petition for divorce.
>
> 2. That the ground of cruelty was false and was arrived at by the defendant [respondent] and Wigley by collusive agreement.
>
> 3. That at the hearing on the divorce petition, the defendant [respondent] lied as to her residence and as to the merits of the case." (R. 435.)

At the time respondent and Wigley perpetrated the fraud on the Texas court, petitioner was not even acquainted with her (PA 36, 203-204). It is undisputed that he had no knowledge of her fraud and collusion, did not participate therein, and, of course, has had no right or opportunity to attack the Texas decree directly.

The court below held that the Full Faith and Credit Clause *compelled* Delaware to recognize the Texas divorce decree even though it had been obtained by fraud and collusion concerning the existence of a cause of action, and even though a fraud had thereby been perpetrated on the Texas court (R. 439-440).

The court below went further and held that the collusive divorce decree was not a nullity in Texas, which was erroneous. Such erroneous holding deprived petitioner of due process of law.

VI. How the Federal Questions Arose.

The Full Faith and Credit Clause and the related statute (28 U. S. C. § 1737) were urged by respondent as a reason for dismissal of the complaint in the trial court (PA 13). They were the basis of the decision of dismissal by the trial court (85 A. 2d at 711-714). Their alleged applicability was the basis for the judgment of the Supreme Court of Delaware (R. 439-440). The petitioner urged below that he would be denied due process if the Texas divorce decree were not held to be a nullity (R. 451).

VII. Reasons for Allowing the Writ.

In recent years this Court has frequently granted certiorari in order to dispel some of the confusion that has surrounded the relation of divorce decrees to the Full Faith and Credit Clause. *E.g., Cook v. Cook,* 342 U. S. 126 (1951); *Johnson v. Muelberger,* 340 U. S. 581 (1951); *Coe v. Coe,* 334 U. S. 378 (1948); *Sherrer v. Sherrer,* 334 U. S. 343 (1948).

However, at least one related constitutional question remains obscure because it has not as yet been decided by this Court. That question is squarely presented by the present case. It is a question that was foreshadowed and left without an answer in the *Cook* case, *supra,* in which this Court said:

> "We also reserve the question • • • whether respondent [putative husband] would not be in a position to attack the Florida decree collaterally if it were found to be collusive • • •." (342 U. S. at 129.)

Here the Delaware court has held that Article IV, Section 1 of the Constitution *requires* it to give full faith and credit to a divorce decree procured solely by respondent's (and Wigley's) fraud and collusion concerning the very existence of the cause of action on which her suit was based. Here (unlike the situation envisaged in the *Cook* case),

petitioner is without the slightest taint of participation in respondent's fraud.

Here, though the parties to the divorce action appeared before the Texas divorce court, they brought with them no cause of action. The court apparently had "jurisdiction" over the parties who were defrauding it, but there was no jurisdiction over a cause of action as there was none, and so the "jurisdiction" of the court was over nothing. *Res judicata* cannot apply in such circumstances. There was no *res* to *adjudicate*.

The necessary implications to be drawn from this Court's judgments in analogous cases are opposed to the decision below. Nonetheless, partly because this Court has not yet decided the question involved, the Delaware court misapplied the Constitution in a mistaken effort to adhere to its letter. The result of the error, unless review is granted by this Court, will be to perpetuate the respondent's fraud, to insulate the liar from the consequences of her lie and to penalize the innocent petitioner—all under the shelter of the Full Faith and Credit Clause. Without review and reversal by this Court, the same shelter will be afforded other frauds and liars in years yet to come, for the situation here presented is litigated with great frequency.

The foregoing is not the only defect of the judgment of which review is sought: the court below committed a plain error in holding that the decree obtained in Texas through the collusion was not a nullity in Texas. As a consequence of this error, petitioner has been deprived of that due process of law guaranteed by the Fourteenth Amendment.

By its decision the Delaware court decided important federal questions of substance as to the proper scope and application of the Full Faith and Credit Clause and the due process clause in a way not in accord with applicable decisions of this Court, or, alternatively, which have not been, but should be, determined by this Court. This case "involves important issues in the adjustment of the domes-

tic-relations laws of the several states." *Johnson v. Muelberger,* 340 U. S. 581 at 583 (1951). It should be reviewed.

A. *The Full Faith and Credit Clause Does Not Compel Recognition of a Divorce Decree Obtained by Fraud and Collusion as to the Existence of a Cause of Action.*

At least since the decision in *Bell v. Bell,* 181 U. S. 175 (1901), it has been a commonplace of constitutional doctrine that a divorce decree entered by a court without jurisdiction is not entitled to full faith and credit. This is because jurisdiction is one of the elements that are basic to the question whether there exists "the power to exert judicial authority * * *." See *Williams v. North Carolina,* 325 U. S. 226, 230 (1945). Here "jurisdiction" of the parties is conceded; but there was no controversy before the court. Has a court any "power to exert judicial authority" when—even though technical jurisdiction over the parties may exist—there is before the court no cause of action, no genuine controversy, but only a fraud? Petitioner believes that it plainly has not, that a court purporting to decide a controversy which does not exist is powerless to "exert judicial authority."

The Texas decree was granted because respondent and Wigley, acting pursuant to their collusive agreement, lied to the court about the existence of grounds of divorce.[5] If the truth had been known, the Texas court would not have issued its decree; for in truth there was no basis whatever on which a decree could issue.[6] The Delaware Supreme

5. We say respondent and Wigley both lied. Collusion by its very nature is a species of conspiracy. The conspiracy in the Texas case was by the litigants to put over on the court a fabricated cause of action. The respondent here did all the testifying, but, as in all conspiracies, the overt act of one conspirator is chargeable to all of the co-conspirators and, therefore, her overt act of lying became equally his.

6. In Texas, as elsewhere, divorce can be granted only for certain grounds (Texas Revised Civil Statutes, Article 4629). It cannot be granted where there is collusion.

Court decreed in effect that CRIME PAYS by holding that the Full Faith and Credit Clause immunizes and protects from attack a decree obtained through collusion and by the commission of a crime.

It never was suggested, until the opinions in the courts below, that the Full Faith and Credit Clause compels recognition of decrees obtained in the manner respondent obtained her Texas divorce decree. There are, on the contrary, many indications that recognition of such decrees is not required.

As we pointed out above this Court has indicated that the previous cases of this Court have not said the last word on the recognition of collusively obtained divorce decrees. *Cook v. Cook*, 342 U. S. 126 (1951). Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees*, 65 Harv. L. R. 193, 216, came to the same conclusion.

This Court recognized in *Sherrer v. Sherrer*, 334 U. S. 343 (1948) that: "The full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation. If in its application local policy must at times be required to give way, such 'is part of the price of our federal system.' *Williams v. North Carolina*, 317 U. S. 287, 302, 87 L. Ed. 279, 288, 63 S. Ct. 207, 143 ALR 1273 (1942)." The Court made it clear, however, that recognition is not required in all instances when it said: "This is not to say that in no case may an area be recognized in which reasonable accommodations of interest may properly be made." Since recognition is not required in all cases it should not be required of a decree such as the Texas decree which was obtained by fraud and collusion. Texas could have no complaint if Delaware refused to recognize the divorce decree, since the

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Texas Revised Civil Statutes, Article 4633 in part reads as follows: "* * * but no divorce shall be granted upon the evidence of either husband or wife, if there be any collusion between them." And in Texas, as elsewhere, perjury is a crime (Texas Penal Code, Article 308).

parties obtained it by an imposition on the Texas court. Hence, refusal to recognize such a decree would not violate the purpose or spirit of the Full Faith and Credit Clause.

Previous decisions of this Court in such cases as *Sherrer v. Sherrer*, 334 U. S. 343 (1948); *Coe v. Coe*, 334 U. S. 378 (1948); and *Johnson v. Mudberger*, 340 U. S. 581 (1951) implicitly hold that recognition is required only where the proceeding is adversary and non-collusive. Not only were the proceedings in these cases adversary in the true sense of the word, but this Court thought it important to point out in the *Johnson* case (340 U. S. at 582), for example, that the respondent appeared and "*contested the merits.*"

The principle of *res judicata* furnished the basis for compelling recognition in these cases. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees*, 65 Harv. L. R. 193, 216. That principle is obviously inapplicable where the decree is obtained by fraud and collusion.

The presence of both parties in the Texas proceeding was without significance. The presence of both parties in court is significant only where there is a true adversary proceeding. Where, however, the proceeding is collusive and non-adversary the presence of both parties in court does nothing more than furnish two parties rather than one, bent on deceiving the court. A proceeding that would be invalidated by one liar cannot be validated by two.

The decision of the court below is inconsistent with the principle announced by the New Jersey Supreme Court in *Staedler v. Staedler*, 6 N. J. 380, 78 A. 2d 896 (1951). That court held that a Florida decree was not binding although both parties had been before the Florida court. The parties had colluded on the jurisdictional issue and there was, therefore, affirmative fraud on the divorce court. This New Jersey decision, based on the principle that the Full Faith and Credit Clause operates for the advancement of justice rather than for the perpetuation of fraud, must be the law.

This New Jersey decision is inconsistent with the ratio of the Delaware decision below. The court below ap-

parently would have held that recognition was not required if the fraud and collusion had gone to the residential jurisdiction of the court rather than to the existence of the cause of action (R. 439). There is no constitutional basis for such distinction. The fraud and imposition on the court is as bad in one case as in the other. *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260 (1891). This conflict emphasizes the need of review by this Court to clarify the limits of recognition *compelled* by the Full Faith and Credit Clause.

The basic contention of the court below is that fraud once it has been successfully perpetrated must be recognized and perpetuated under the mandate of the Full Faith and Credit Clause. The decision of the court below, holding that recognition of such decrees is compelled by the Full Faith and Credit Clause is an unwarranted and dangerous interpretation of an important constitutional provision. The decision should be reviewed and corrected.

B. *Misinterpretation by the Court Below of the Texas Law on the Invalidity of the Texas Decree Deprived Petitioner of Due Process of Law.*

We urge, as an independent reason for the issuance of the Writ, that the Texas decree was a nullity in Texas, and that, therefore, another state is not required by the Full Faith and Credit Clause to give it credit. See *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430 (1943). The court below's erroneous interpretation of the Texas law on nullity deprived petitioner of due process of law. It gave faith and credit to a nullity.

The common law rule, universally followed,[7] is that a collusively obtained decree is a nullity. This is so whether the collusion and fraud go to the merits or the jurisdiction of the court. *Adams v. Adams*, 154 Mass. 290, 28 N. E.

7. Some courts, but not all, *do* deny relief from such judgments or decrees to a *party*. Cf. *Hall v. Hall*, 93 Fla. 709, 112 So. 622 (1927) and *DeBeque v. Ligon*, 286 S. W.

260 (1891 per Holmes, J.). *Earl of Bandon v. Becher*, 3 Clark & F 479, 6 Eng. Rep. 1517 (1835); 2 Freedman, *Judgments* § 731; 2 Bishop, *Marriage, Divorce and Separation* §§ 697-700; 2 Black, *Judgments* 2d Ed. § 508.

In speaking of a judgment induced by fraud and collusion going to the merits, Lord Chancellor Brougham, in the *Becher* case, said:

> "• • • It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; that it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up • • •."

In coming to this conclusion the Lord Chancellor referred with approval to the statements of Solicitor-General Wedderburn (later Lord Chancellor Loughborough) made in the celebrated *Duchess of Kingston's Case*, 20 Howell's State Trials 478-9 (1776) concerning a "judgment" or "sentence" as follows:

> "• • • a judicial determination of a cause agitated between real parties, upon which a real interest has been settled;—in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit: there is no Judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question."

Texas explicitly follows the rule of these cases. *Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599 (Sup. Ct.

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749 (Tex. Civ. App. 1926) with *Staedler v. Staedler, supra.* This is simply an application of the "clean hands" doctrine. Other states permit even a *party* to attack such proceedings on the ground that the state has a paramount interest. *Staedler v. Staedler, supra.*

1894); *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748 (Sup. Ct. 1848). These are the only decisions on this point by the Texas Supreme Court. They have never been overruled nor their force diminished.

The court below both misinterpreted and misapplied the Texas law:

It misinterpreted the Texas law in that it relied on general statements in lower court decisions that a judgment procured by fraud is not void unless the fraud charged goes to the jurisdiction of the court. It failed to recognize that these general statements were subject to an exception and were not applicable where the judgment was obtained by fraud and collusion as to the existence of a cause of action (merits). *Smith v. Brown, supra*, shows the existence of such an exception.

None of the cases relied on by the court below involved fraud and collusion as to the existence of a cause of action. None was non-adversary and none purported to overrule the *Gay* or *Brown* cases. It is hardly credible that the inferior Texas courts would purport to overrule, *sub silento*, the obviously salutary rule of *Smith v. Brown, supra*, in cases which did not even involve fraud and collusion as to the merits.

The court below in discussing *Smith v. Brown, supra*, said (R. 439):

> "The second of the two cases is Smith v. Brown (Tex. Sup.) 3 Texas 360, 49 Am. Dec. 748. We think, however, that this case has nothing to do with the problem before us. The court in the Smith case affirmed a judgment dismissing an action on the ground that *the action was wholly fictitious*. The action was based upon a purported obligation which on its face showed that it was in fact a wager. The Smith case has no application to the case before us since the divorce action in Texas in which the defendant here was plaintiff was admittedly based upon a valid marriage over which the Texas court had jurisdiction." (Emphasis supplied.)

The error of the court below was that it failed to recognize that in this case "the action was wholly fictitious" and hence the decree a nullity. We are attacking the Texas divorce, not the Texas marriage. The Texas divorce proceedings were "wholly fictitious" just as were the proceedings in the *Smith* case. Since the Texas divorce decree was a nullity in Texas even according to the court below's statement of the Texas law, the Full Faith and Credit Clause does not compel that it be recognized. Indeed, such a decree cannot be recognized consistent with due process.

This Court should review the determination of the Texas law by the court below, especially since its misinterpretation of that law is so dramatically clear and the consequences of it are so harmful and potentially dangerous. This Court in *Johnson v. Muelberger, supra*, rejected the New York Court of Appeals' determination of the effect of the Florida judgment under Florida law when the error of the New York court was much less clear than the error of the court below.

We do not suggest, of course, that this Court should in all cases review one state court's determination of the law of a sister state. We *do* suggest that the determination by the court below of Texas law was so patently wrong in an area which is so very important to the continued integrity of our judicial system that review is warranted by this court.

Conclusion.

Wherefore, for the several reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR RESPONDENT IN OPPOSITION.

I. Opinions Below.

The petition contains adequate references to the opinions of the Superior and Supreme Courts of Delaware except, as may now be noted, the opinion of the Supreme Court of Delaware now appears in 90 A. 2d 468.

II. Jurisdiction.

The Respondent denies that this Court has jurisdiction under 28 U. S. C. § 1257(3) to entertain the petition. This will be the first subject discussed, *infra*, page 5, under heading VII entitled "Reasons for Denying the Writ".

It should also be observed under the present heading that the Superior Court of Delaware had admitted jurisdiction both of the parties and of the subject matter to entertain and decide the complaint below for annulment of

marriage. Revised Code, Delaware, 1935, §§ 3497, 3502,[1] 3504.[2] The Supreme Court of Delaware had constitutional jurisdiction to hear and determine petitioner's writ of error from the Superior Court. Art. IV, Sec. 11(1), Constitution of Delaware, amended by Chapter 109, Volume 48, Laws of Delaware.[3]

III. Respondent's Counter-Statement of the Questions Presented.

Respondent's position is that the questions involved may be better stated in the following form:

1. Does this case involve a "right, privilege or immunity" of Petitioner under 28 U. S. C. § 1257(3)?

2. Does Petitioner, who married Respondent in 1948 with knowledge that Respondent had been divorced from a former husband in McLennan County, Texas, in 1940, in an action where the court had jurisdiction of the subject matter and of the persons of *both* parties, have the right and status, in a Delaware annulment action, collaterally to attack the validity of Respondent's 1940 divorce and thus to contend in the Delaware action that his own marriage to Respondent was bigamous?

3. Under the facts stated in question 1 does the Constitution of the United States (Art. IV, Sec. 1) require the Delaware Courts to accord Full Faith and Credit to Respondent's 1940 Texas divorce?

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1. "The Superior Court of this State shall have and entertain jurisdiction of all actions for annulment of marriage, or for divorce."

2. "For purposes of annulment of marriage, jurisdiction may be acquired by personal service upon the defendant within this State, when either party is a bona fide resident of this State at the time of the commencement of the action." The respondent (defendant below) was a bona fide resident of Delaware at the time the petition was filed and was served personally.

3. "Section 11. The Supreme Court shall have jurisdiction as follows:

(1) To issue writs of error in civil causes to the Superior Court and to determine finally all matters in error in the judgments and proceedings of said Superior Court in civil causes."

Question 3 would seem to involve subordinate questions which may be stated separately as follows:

4. Would Petitioner have had any right or status to attack the validity of Respondent's 1940 divorce in any judicial proceeding in the State of Texas?

5. Accepting Petitioner's theory for purposes of argument, was the Texas decree void or voidable only?

IV. Constitutional Provisions Involved.

Admittedly, the petition here deals with the proper application by the Delaware Courts of the Full Faith and Credit Clause (Art. IV, Sec. 1) of the Constitution of the United States. Respondent denies that the Due Process Clause of Sec. 1 of the 14th Amendment has any application.

V. Statement.

In conformity with Rule 12(b) of the Rules of the Superior Court of Delaware which, for all present purposes, is identical with the rule of a corresponding number of the Federal Rules of Civil Procedure, Respondent filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, as part of her answer to the complaint (PA 12,[4] First Defense). Respondent also filed a motion for Summary Judgment under the Superior Court Rule corresponding to Federal Rule 56. Later both motions were withdrawn (PA 16) and the case proceeded to a long and tedious trial involving 2699 pages of typewritten transcript and 136 exhibits which, to the extent desired by the parties, were reproduced in the Supreme Court of Delaware and are presented here by a total of 919 printed pages of appendices.

Both the Superior Court and the Supreme Court decided this case solely upon the uncontroverted facts, i. e.,

4. Petitioner's (plaintiff's) appendix below is referred to herein as "PA"; Respondent's (defendant's) as "DA".

as on Motion for Summary Judgment. The controverted facts, including particularly Petitioner's charges of fraud and collusion in connection with Respondent's 1940 Texas divorce, have not been the subject of findings.

This situation is made clear by the following quotation from the Opinion of the Supreme Court of Delaware (R. 435; 90 A. 2d at p. 470):

> "The foregoing facts are stated to be uncontroverted. With respect, however, to the allegations of fact supporting the asserted grounds for annulment, the contentions of the parties are in direct conflict. The court below, for the purposes of the defendant's motion to dismiss, assumed that the controverted allegations should be considered as having been established by competent evidence. We will do the same, although in fairness to the defendant, it should be stated that she denies the truth of the assertions made by the plaintiff in these respects."

Petitioner's "Statement" contains, quite largely, references only to testimony on his own side of the controverted fact issues. But, there was substantial competent evidence, not only that the Respondent had never given up her Texas domicile, but also that the 1940 divorce was not collusive and that the charge of cruelty was true. DA 28, 29; PA 413-417. In fact, there is no evidence, even on Petitioner's side, to the effect that the event which resulted in the charge of cruelty in the Texas divorce case *did not* take place.

The Respondent secured her divorce from Willard R. Wigley, her former husband, on July 6, 1940. PA 11. Respondent and Petitioner did not meet until April 1, 1947. PA 205; DA 319, 320. Petitioner proposed marriage to Respondent within a week or ten days thereafter. DA 88, 89.

About July, 1948, Petitioner's former wife, Marcella, went from Delaware, where she and her husband had lived for many years, to Wyoming where she secured a divorce from Petitioner on August 30, 1948 (DA 320, 341, 342)

after Petitioner had made a substantial property settlement on her. DA 118, 350. He then married Respondent on November 20, 1948, in the City of New York after they had first secured a license by appearing together at the license bureau and exhibiting their respective divorce decrees, Respondent's from Wigley, July 6, 1940, Petitioner's from his former wife, Marcella, August 30, 1948. DA 356, 357.

VI. The Alleged Federal Question.

This heading of the petition sets forth Petitioner's position and contention and requires no comment. For reasons hereafter given Respondent denies that this case presents any substantial federal question.

VII. Reasons for Denying the Writ.

A. *There is no jurisdiction in the Supreme Court under 28 U. S. C. §1257(3) in that the giving of Full Faith and Credit by the Delaware Courts to the Texas divorce decree does not affect any substantial "right, privilege or immunity" of Petitioner.*

It cannot now be gainsaid but that the *giving* of full faith and credit by a state court to a judgment of a sister state raises generally a federal question under the present statute to the same extent as a *denial* of recognition of such judgment would have raised that question.

But for the Court to have jurisdiction under the statute it is also a familiar principle that the federal question must be substantial. It would seem to follow logically that if, under 28 U. S. C. § 1257(3) no substantial "right, privilege or immunity" of Petitioner is here involved, by the giving of full faith and credit to the Texas decree of divorce, there can be no substantial federal question and consequently no jurisdiction under the statute.

The principle which we here urge was stated by Mr. Justice Brewer in *County Court v. West Virginia ex rel Dillon,* 208 U. S. 192, at 197, as follows:

> "The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official nature."

In *Sherrer* [5] and in *Coe* [6] one of the parties to the challenged judgment attacked its validity. Such party had a direct, a personal and a substantial interest. The *Johnson* [7] case involved the right of a deceased party's daughter and legatee to challenge the validity of her father's divorce in a case where the Petitioner's property rights were affected by the challenged decree.

In the *Cook* [8] case petitioner and respondent were living together, ostensibly as man and wife, in consequence of a ceremonial marriage, when the petitioner's oversight in failing to obtain a divorce from a former husband came to respondent's attention. He then sent her to Florida to obtain a divorce and paid part of the expenses. The parties then went through another ceremonial marriage and it was the validity of that marriage and of the petitioner's antecedent divorce that were brought in issue later in a Vermont annulment case by the respondent husband who, though not a party to the Florida divorce, had indirectly sponsored and facilitated it. The Supreme Court of Vermont declined to accord Full Faith and Credit to the Florida decree and held both it and the second marriage void. There a direct and substantial right of the petitioner's wife, who opposed the annulment and who contended for the validity of the Florida divorce and the consequent validity of her marriage, was involved and a substantial federal question was presented.

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5. *Sherrer v. Sherrer*, 334 U. S. 343.
6. *Coe v. Coe*, 334 U. S. 378.
7. *Johnson v. Muelberger*, 340 U. S. 581.
8. *Cook v. Cook*, 342 U. S. 126; decision of Vermont Supreme Court after remand: *Cook v. Cook*, 86 A. 2d 923.

But, in *Cook* this Court said (342 U. S. at pp. 127, 128):

> "If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (*Sherrer v. Sherrer*, 334 U. S. 343) or appeared and admitted her Florida domicile (*Coe v. Coe*, 334 U. S. 378) or was personally served in the divorce state (*Johnson v. Muelberger*, 340 U. S. 581, 587), he would be barred from attacking the decree collaterally; *and so would a stranger to the Florida proceedings, such as respondent, unless Florida applies a less strict rule of res judicata to the second husband than it does to the first.*" (Emphasis supplied.)

In the instant case Petitioner married Respondent more than eight years after her divorce from Mr. Wigley. He did not meet Respondent until almost seven years after the divorce (PA 204) and was not concerned in interest, directly or indirectly, with the Texas divorce, except, as it turned out some eight years later, it made possible the fulfillment of his own desire to marry Respondent. He married Respondent with full knowledge of that prior divorce and with the tacit recognition that his marriage to Respondent was valid only in the event both his and her prior divorces had validity. We therefore contend that no right of Petitioner is involved where the Delaware court accorded Full Faith and Credit to the Respondent's antecedent Texas divorce.

Added emphasis is given to this point by the italicized language from the *Cook* case quoted above. Texas, like Florida, has a rule of *res adjudicata* which is not *less strict* as to the second husband than to the first. In fact the Texas rule is *more strict*. This was recognized in the opinion of the Supreme Court of Delaware (R. 437; 90 A. 2d at p. 471):

> "Under the law of Texas, a stranger to the judgment will be permitted to make a collateral attack

upon a judgment of a Texas court only if the stranger had a pre-existing right at the time the judgment was entered which has been prejudiced by its entry. *Sanger v. Tramwell* (Tex. Sup.) 66 Texas 361, 1 S. W. 378; *Urban v. Bagby* (Tex. Civ. App.) 291 S. W. 537; *National Loan and Investment Co. v. Pelphrey & Co.*, (Tex. Civ. App.) 39 S. W. 2d 926. Therefore, since the plaintiff at the time the Texas divorce decree of the defendant was entered had no pre-existing right prejudiced by that decree, Texas would not permit him to attack it collaterally."

Texas says, therefore, that Petitioner has no pre-existing right which will permit him to challenge the decree of its court divorcing Respondent from a former husband. Therefore, no "right, privilege or immunity" of Petitioner is involved where a Delaware court gives Full Faith and Credit to that Texas judgment.

B. *The Texas decree could not have been void even on Petitioner's theory; but, if Petitioner had sustained his case on the facts, would have been voidable only, and not subject to attack by Petitioner.*

The Supreme Court of Delaware said (R. 438; 90 A. 2d at p. 472):

"Fraud or collusion not relating directly to the jurisdiction of the court entertaining the action, under the law of Texas, makes a judgment entered in the action voidable and, thus, subject only to direct attack by way of appeal or proceedings in equity. *Hollis v. Hollis*, (Tex. Civ. App.) 226 S. W. 2d 129; *Bragdon v. Wright*, (Tex. Civ. App.) 142 S. W. 2d 703; *Uvalde Paving Co. v. Crabb*, (Tex. Civ. App.) 7 S. W. 2d 678; *deBeque v. Ligon*, (Tex. Civ App.) 286 S. W. 749, and *Ferguson v. Ferguson*, (Tex. Civ. App.) 98 S. W. 2d 847.

"It seems clear, therefore, that under the law of Texas a judgment is void and subject to collateral attack only when the court entering the judgment lacked jurisdiction over the subject matter or parties and when that lack of jurisdiction appears from the record of the judgment."

We submit that the Delaware Court (R. 436, 437; 90 A. 2d at p. 471) also properly read the *Cook* case, *supra*, as one in which, because of insufficient findings below, the Supreme Court could not determine whether the defendant in the divorce action had appeared or had been served.[9] This absence of factual data left open the further question of whether the plaintiff in the annulment action would be estopped to raise the lack of the defendant's appearance (if such had been the fact) in the divorce action where he had arranged for and facilitated the bringing of such action.

Neither by Cook nor by any other Supreme Court case we have seen has it been suggested that a judgment voidable only may be attacked collaterally by a stranger to it.

The case of *Texas & P. Railway Co. v. Gay*, 86 Texas 571, 26 S. W. 599, upon which Petitioner relies (Petition, pp. 11, 12), was, as observed by the Delaware Supreme Court (R. 438, 439), one of a *void* decree because the court rendering it had no jurisdiction either of the subject matter (to appoint a receiver) or of the person of the corporate defendant. The case of *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748, also relied upon (Petition, p. 12), is even more remote from the problem. As noticed by the Delaware Supreme Court (R. 439; 90 A. 2d at p. 472) "The action was based upon a purported obligation which on its face showed that it was in fact a wager". In short, the action did not present a justiciable controversy. In that early Texas case the court quite properly refused, *sua sponte*, to

9. See *Cook v. Cook* (Vt. Supreme Ct., 1952), 86 A. 2d 923, where, after remand, the State Supreme Court, gave final effect to the presumptive validity of the Florida divorce.

pass upon a Constitutional question raised in an action which was wholly fictitious and moot.

Petitioner's basic error is a failure to recognize the familiar distinction between intrinsic and extrinsic fraud. The English authorities cited (Petition, p. 11) are not authoritative in this Court or, in fact, in this country.

The type of fraud in connection with the entry of a judgment which will permit a successful collateral attack is that active fraud which by trickery or coercion prevents a party from making a full and fair defense. This is extrinsic fraud. Such is the well established American as opposed to the English rule. *Beale, Conflict of Laws,* Vol. 2, § 440.4, p. 1403, *et seq.* It is recognized in *U. S. v. Throckmorton,* 98 U. S. 61; *Toledo Scale Company v. Computing Scale Company,* 261 U. S. 399; *Independence Lead Mines Co. v. Kingsbury* (9th Cir.) 175 F. 2d 983. See also: *Christmas v. Russell,* 5 Wall. (U. S.) 290; *Union National Bank v. Lamb,* 337 U. S. 38.

It is, perhaps, unnecessary to repeat that in the instant case Petitioner makes no contention that there was *extrinsic* fraud in connection with the Texas divorce and his contention as to *intrinsic* fraud, i. e., collusion and perjury, is the subject of substantial, and, as we believe, convincing evidence in refutation and has not been the subject of fact findings below.

Therefore, even if there had been fraud and collusion in connection with the 1940 Texas divorce (all of which Respondent denies) it was fraud wholly *intrinsic* in nature, decided and set at rest as a part of the Texas court's adjudication, and subject to subsequent challenge only in a Texas court, in a timely action, by a party having a pre-existing right in the matter. The Constitution demands and requires that Delaware give Full Faith and Credit to that Texas decree and the present petition is frivolous and wholly insubstantial.

CONCLUSION.

Petitioner, a stranger with no pre-existing rights in his wife's 1940 Texas divorce, has no right protected by the Constitution, to attack in Delaware a divorce decree entered by a Texas court of competent jurisdiction as a result of proceedings in which both parties appeared, especially where a similar attack would surely fail in Texas. *Johnson v. Muelberger, supra.*

Quite apart from the jurisdictional question, *ante* p. 5, it seems clear to Respondent not only that the United States Supreme Court has heretofore fully determined each and every federal question involved here, but also that the Superior and Supreme Courts of Delaware decided every federal question in the case "in accord with applicable decisions of this court", *i.e.* the *Sherrer, Coe, Johnson* and *Cook* cases, cited above. Rule 38, par. 5(a), Rules of the United States Supreme Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEP 10 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1952.

No. 268.

ALFRED VICTOR duPONT,
Petitioner,

v.

DOROTHY ELIZABETH BARTON duPONT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware.

REPLY BRIEF IN SUPPORT OF PETITION.

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ALFRED VICTOR duPONT,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

REPLY BRIEF IN SUPPORT OF PETITION.

We deal in this reply brief only with the specific matters in respondent's brief which seem in most urgent need of correction.

The numbers in parentheses in the headings refer to the pages where the particular subject is discussed in respondent's brief.

I. Reply to Respondent's Statement (3-5).

Respondent's statement makes it clear that she misread the opinion of the Supreme Court of Delaware, and that, but for this, would agree that review by this Court is necessary. She argues that the evidence does not necessarily show that her 1940 Texas divorce was collusive and that there was no ground of divorce in fact. However, such argument is not open to her. As we pointed out at page 4 of our Petition, the court below assumed that our factual allegations—including the allegation that respondent obtained her Texas divorce by a collusive agreement as to the existence of a cause of action—were established by com-

petent evidence (R. 435). Consequently no fact issue is raised by the Petition. Respondent's attempt to argue the facts here shows that she misconceives the basis for the decision by the court below and fears the facts which were assumed by it to be true.

II. Reply to Respondent's Argument A (5-8).

Respondent argues that the decision of the court below granting faith and credit to the collusive Texas decree does not affect any "right, privilege or immunity" of petitioner. The speciousness of this argument is shown by respondent's reliance on *County Court v. West Virginia ex rel. Dillon*, 208 U. S. 192 (1908). The Court in that case was concerned only with the validity of a state statute. This Petition presents a vastly different situation. It is not concerned with any question as to the validity of a state statute. Petitioner claims that the court below misinterpreted the Full Faith and Credit Clause and that such erroneous interpretation denied him a right and privilege under the Constitution of the United States. He therefore comes directly within the provisions of this Court's jurisdiction as provided by 28 U. S. C. sec. 1257(3). This Court made this precise distinction in *Coleman v. Miller*, 307 U. S. 433, 438 (1939) where it specifically held (307 U. S. at 438) that the rule of *County Court v. West Virginia ex rel. Dillon, supra*, was inapplicable where a right and privilege were claimed under the Constitution of the United States.

Since petitioner's claim is that the court below denied him a right and privilege protected by the Constitution of the United States, respondent's argument and discussion (Resp. brief pp. 6-8) concerning the doctrine of pre-existing rights under Texas law are irrelevant. The issue under this section is whether the court below was incorrect in holding that the Full Faith and Credit Clause *required* recognition of a divorce decree obtained by fraud and collusion as to the existence of a cause of action, not the effect of such

decree under Texas law. We showed (Petition pp. 10-13) that the Texas decree was a nullity in Texas, but, regardless of this, the Texas decree at the very least was obtained by fraud and collusion and hence by an imposition on the Texas court. There is no element of *res judicata* and there is no reason of policy that requires the giving of full faith and credit to a decree obtained in such manner.

The purpose of *res judicata* is the putting to end of litigation between two parties. Where, as here, there was no dispute between the parties to litigate, the doctrine has no application. And Texas could have no complaint if Delaware in this case refused to recognize the divorce decree, for that decree was obtained by an imposition on the Texas court of which the court had no knowledge and for which it had no means for discovering. Respondent does not meet our contention that the Full Faith and Credit Clause does not require recognition of a decree obtained in such manner. She does not even discuss it.

Respondent's discussion and argument under this point show, as much as our own, the need of review and reversal by this Court. The constitutional question presented by the present case remains obscure because it has not as yet been expressly decided by this Court.

III. Reply to Respondent's Argument B (8-10).

Respondent has conceded, perhaps unwittingly, that the Texas decree was a nullity under Texas law. At pages 9 and 10 of her brief in discussing *Smith v. Brown*, 3 Tex. 360, 49 Am. Dec. 748 Sup. Ct. (1848) she says:

> "In short, the action did not present a justiciable controversy. In that early Texas case the court quite properly refused, *sua sponte*, to pass upon a Constitutional question raised in an action which was wholly fictitious and moot."

The facts of this case are on all fours with the facts of *Smith v. Brown, supra.* There was, similarly, no cause of

action in this case. Under the assumption made by the court below that our allegations were fully established (R. 435), it is clear that there was no controversy to be adjudicated in Texas. The purported controversy "was wholly fictitious and moot," and non-justiciable.

It is difficult to see how the Supreme Court of Delaware in the face of this decision (*Smith v. Brown*) was able to conclude that judgment rendered on another feigned cause of action was in Texas not a nullity but a judicial act to which at least some respect would be paid in Texas. That holding amounts to a determination that the Texas courts would reject a fictitious cause of action when the fraud and collusion are patent, but uphold it when the fraud and collusion are clandestine and concealed. Obviously, this is not the Texas law.

Respectfully submitted,

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